

**JAMES MCKINNEY**  
Claimant

**ELITE LOGISTICS, INC.**  
Respondent

**AMERICAN ZURICH INS. CO.**  
Insurance Carrier

<sup>2</sup> Respondent's Brief at 10 (filed Sept. 1, 2006).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board finds the ALJ's preliminary hearing Order should be affirmed.

The record indicates this is the second preliminary hearing to be held in this matter on the same issue, that of claimant's request for medical treatment to his lower back. Following the first preliminary hearing, the ALJ issued a rather detailed Order<sup>3</sup> which included a summary of the evidence. At the conclusion of that hearing he denied claimant's request for treatment. The ALJ explained the reasons for his denial as follows:

There is nothing in the record to show that the claimant's low back complaints, which didn't surface until months after the accident, bear any relationship to the accident. There is nothing in the record to show that the claimant's left knee complaints, which have been persistent since the accident, have anything to do with a low back condition. The respondent has provided reasonable and necessary medical treatment for any physical complaints apparently related to the June 3, 2004 accident. The additional treatment sought by the claimant is directed at problems unrelated to the accident. The claimant's request for additional medical treatment in this case is denied.<sup>4</sup>

Claimant continued to have low back complaints and maintained his entitlement to medical treatment. A second preliminary hearing was held on July 27, 2006 and in addition to the previously offered testimony and medical evidence, claimant offered a medical report authored by Dr. Daniel Zimmerman dated May 18, 2006. According to Dr. Zimmerman, he believes claimant "did sustain an injury affecting the lumbosacral spine which has caused radicular symptoms affecting the left lower extremity."<sup>5</sup>

After considering this additional evidence, the ALJ again denied claimant's request for treatment to his low back. The ALJ explained his decision this way:

. . . Dr. Zimmerman's history described how the claimant slipped and fell while pulling on a hand jack, and how the claimant had left knee pain following that incident. The history further showed how back pain did not appear in the medical records until April, 2005, ten months after the accident. Zimmerman's report did not provide a good reason how the claimant could suffer a low back injury in a June 3, 2004 accident, and not have back pain until months later. Zimmerman's report also dismissed EMG findings that indicated the claimant did not have radicular pain in the left lower extremity.

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<sup>3</sup> ALJ Order (Mar. 1, 2006).

<sup>4</sup> *Id.* at 2.

<sup>5</sup> Zimmerman's Report dated May 18, 2006 at 7.

The delay in onset of low back symptoms caused the court doubt after the February 27, 2006 hearing, and still does. The claimant failed to prove by a preponderance of the evidence that he suffered a low back injury in the June 3, 2004 work related accident. The claimant's request for additional medical treatment is denied.<sup>6</sup>

Before the Board can consider the claimant's appeal, we must address the respondent's contention that the Board has no jurisdiction over this matter at this juncture of the proceedings.

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.<sup>7</sup>

Although both the ALJ and the parties continually referenced claimant's request for "additional medical treatment", the true focus of this preliminary hearing was whether claimant sustained an injury to his back in his admittedly compensable accident that occurred on June 3, 2004. Respondent has admitted claimant sustained an accidental injury to his knee. However, the delayed onset of low back complaints has given rise to respondent's argument that claimant did not injure his low back in the accident. Stated another way, respondent is arguing that claimant's alleged low back injury did not arise out of and in the course of his employment. And that argument gives rise to jurisdiction over the preliminary hearing Order.

As for claimant's contention that he has met his burden of showing that his back complaints are causally related to his June 3, 2004 accident, the Board finds that the ALJ's preliminary hearing Order should be affirmed. As noted by the ALJ, there was a significant

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<sup>6</sup> ALJ Order (July 27, 2006) at 1-2.

<sup>7</sup> See K.S.A. 44-551.

period of time between the accident and his initial low back complaints. And while Dr. Zimmerman has opined that the low back condition was attributable to the June 3, 2004 accident, his report fails to explain why claimant has experienced no back complaints if his back was injured immediately after his June 3, 2004 fall or why the EMG findings did not reflect radicular pain into the lower extremity.

Like the ALJ, based upon the evidence so far developed, the Board is unpersuaded that the claimant's low back complaints bear any causal relationship to the June 3, 2004 accident. Accordingly, the ALJ's preliminary hearing Order is affirmed.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated July 27, 2006, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2006.

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BOARD MEMBER

c: Dale E. Bennett, Attorney for Claimant  
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier